

**BOARD OF ALIEN LABOR CERTIFICATION APPEALS  
800 K STREET, N.W.  
WASHINGTON, D.C. 20001-8002**

**DATE: July 1, 1997**

**CASE NO: 94-INA-593**

**In the Matter of:**

**SHAKLEE CORPORATION,  
Employer,**

**On Behalf of:**

**MASAYASU UENO,  
Alien.**

Appearance: Bruce B. McKee, Esq.  
San Francisco, CA  
for the Employer

Before: Holmes, Vittone, and Wood  
Administrative Law Judges

PAMELA LAKES WOOD  
Administrative Law Judge

**DECISION AND ORDER**

This case arose from an application for labor certification on behalf of Alien Masayasu Ueno ("Alien") filed by Employer Shaklee Corporation ("Employer") pursuant to Section 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the "Act") and the regulations promulgated thereunder, 20 C.F.R. Part 656. The Certifying Officer ("CO") of the U.S. Department of Labor, San Francisco, California, denied the application and the Employer requested review pursuant to 20 C.F.R. § 656.26.

Under Section 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor ("Secretary") has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the

alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed.

Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File ("AF"), and any written argument of the parties. 20 C.F.R. § 656.27(c).

### **STATEMENT OF THE CASE**

On June 2, 1992, as amended, Employer filed with the local office an application for labor certification to enable the Alien, a Japanese national, to fill the position of "Executive Vice President" at a salary of \$3,200 per week. The Alien was at that time employed by the Employer in the same position under an E-2 visa and also had over ten years of executive level experience with various North American branches of the Sumitomo Bank, a Japanese corporation (AF 330-332, 1313-1320). Four years of college, with a B.A. or equivalent in Business or International Relations, as well as five years experience in the job offered or in the related occupation of "Multinational corporate management" were required. The job offered was described as:

Responsible for executive level liaison between Japanese parent company and mid-nine figure sales U.S. subsidiary, participates in discussions regarding the development of Shaklee's business strategy, and for decision making as a member of subsidiary board of directors and executive committee, and as a member of parent company board of directors.

(AF 330). Special Requirements were:

- 1) 5 yrs executive level experience in marketing and corporate international controls.
  - 2) 5 yrs exec. level experience with Japanese multinational management practices;
  - 3) 5 yrs exec. level exp. with Japanese/U.S. business relationships; and
  - 4) Oral/written fluency in Japanese.
- Note: 1), 2) & 3) may be met concurrently.

(AF 330). The Employer's business activity was described as "Direct Marketing Nutritional/Household Products." (AF 330). In a supporting letter, the Vice President,

Human Resources and Corporate Administration, indicated that Shaklee was 92.5% owned by Yamanouchi Pharmaceuticals Co., Ltd., a major multinational manufacturer of drugs and other products, and that it also operated under other trade names such as "Harry and David" and "Jackson & Perkins." He further stated:

Mr. Ueno is responsible for executive level liaison between Yamanouchi and Shaklee, participates in discussions regarding the development of Shaklee's business strategy, and for decision-making as a member of Shaklee's Board of Directors and Executive Committee. These duties require the use of a broad range of business and management skills, including the ability to communicate effectively with top level Yamanouchi executives in Japanese.

(AF 1313). An additional statement was submitted in support of the foreign language requirement, together with various attachments, most of which were in Japanese. (AF 938-939, 940-1293).

A transmittal form from the state agency indicated that there were 110 U.S. applicants. (AF 329; **see also** AF 661-665, 756-759, 875-876). Follow-up questionnaires were obtained from some of the applicants. (AF 333-483, 577-578). The Employer's recruitment report indicated that four of the 110 resumes were duplicates, three applicants were not applying for the position, 46 were eliminated as unqualified, and requests for additional information were sent to the remaining 57; of the ten who responded to the requests for additional information, nine were unqualified and the tenth (the only one interviewed) was determined to be unqualified following the interview. The alleged basis for rejecting the applicants was provided in correspondence and on worksheets attached to the resumes. (AF 1296-1299; **see also** AF 484-937).

On May 14, 1993, the CO issued a Notice of Findings in which he notified the Employer of the Department of Labor's intention to deny the application on several bases, citing sections 656.50 [a miscite for the definition now appearing at section 656.3] , 656.24(b)(2)(ii), and 656.20(c)(8) of title 20, Code of Federal Regulations. Specifically, the CO indicated that (1) there was no clear opening for U.S. workers in view of the Alien's control of the Employer's company (citing sections 656.20(c)(8) and the definition of "Employment" now appearing in section 656.3); (2) the Alien is unqualified (citing Board of Alien Labor Certification Appeals (BALCA) decisions indicating that U. S. workers cannot be held to job requirements the Alien does not possess), in view of the fact that the Alien has been unemployed for four years; and (3) there are qualified U.S. workers (citing section 656.24(b)(2)(ii)) in view of the apparent qualification of applicants Divine, Flynn, Forkner, Garrity, Hagiwara, Jacobson, Kita, Rosenbaum, Tozzi, Leslie, Nomura, Tall, Boudreau, Wada, Bergmann, Hart, Morgan, Barnum, Spence, Laurila, Kurahashi, White, Petchey, Nishinaga, Nakai, Stefan, Conte, Mizumoto, Field, and Stathas. (AF 325-328).

The Employer submitted the resumes of the thirty listed applicants by letter of June 3, 1993, and, after being granted an extension of time, submitted its rebuttal on July 2, 1993. (AF 59-324).

On September 16, 1993, the CO issued a Supplemental Notice of Findings finding the rebuttal satisfactory with respect to the Alien's qualifications, but otherwise deficient. The CO also added as an additional ground for denial that the Employer failed to establish business necessity for the foreign language requirement, citing section 656.21(b)(2)(i)(c) and the *en banc* BALCA decision in *In re Information Industries, Inc.*, 88-INA-82 (Feb. 8, 1989) (*en banc*). (AF 55-58).

By letter of October 21, 1993, the Employer's attorney transmitted additional rebuttal by the Employer. (AF 11- 54).

In a Final Determination dated February 3, 1994, the CO found the Employer's rebuttal unsatisfactory on the grounds of non-existent job opening, foreign language requirement, and availability of qualified U.S. applicants. (AF 8-10).

The Employer, through its attorney, requested review of that denial by memorandum of March 10, 1994. (AF 1-7). A timely Appeal Brief was also filed.

## DISCUSSION

The CO denied the application on three bases -- failure to establish a bona fide job opportunity to which U. S. workers could apply, failure to establish business necessity for the Japanese language requirement, and failure to establish a lawful, job-related reason for rejecting qualified U.S. applicants.

### **Bona Fide Job Opportunity**

The CO denied the application based upon the Employer's failure to show the job opportunity was clearly open to any qualified U. S. worker. In this regard, the regulations require that an employer show that the job opportunity has been and is clearly open to any qualified U.S. worker. **See** 20 C.F.R. § 656.20(c)(8). "Job opportunity" is defined as "a job opening for employment at a place in the United States to which U.S. workers can be referred." 20 C.F.R. § 656.3. Although the words "bona fide job opportunity" do not appear in the regulations, the regulations have been administratively interpreted to include this requirement, *Modular Container Systems, Inc.*, 89-INA-228 (July 16, 1991) (*en banc*), *citing Pasadena Typewriter and Adding Machine Co., Inc. et al. v. U.S. Dept. of Labor*, No. CV 83-5516-AABT (C.D. Cal. 1987). A job is not clearly open to U.S. workers and there is no bona fide job opportunity when the job is tailored to meet the alien's qualifications. **See 100 Plaza Clinical Lab**, 93-INA-288 (Aug. 17, 1994). Under the "totality of circumstances" test,

various factors relating to ownership and control are used to determine whether a job is clearly open to any U.S. worker. ***Modular Container Systems, Inc.***, 89-INA-228 (July 16, 1991) (***en banc***) (discussing factors).

Concerning the issue of whether there was a bona fide job opportunity, the factors to be considered under the "totality of circumstances" test to determine whether a job is clearly open to any U.S. worker, set forth in ***Modular Container Systems, Inc.***, 89-INA-228 (July 16, 1991) (***en banc***), are whether the alien: (1) is in a position to control or influence hiring decisions regarding the job for which labor certification is sought; (2) is related to corporate directors, officers or employees; (3) was an incorporator or founder of the company; (4) has an ownership interest in the company; (5) is involved in the management of the company; (6) is on the board of directors; (7) is one of a small number of employees; (8) has qualifications for the job identical to specialized or unusual job duties and requirements stated in the application; and (9) is so inseparable from the sponsoring employer because of his or her pervasive presence or attributes that the employer would be unlikely to continue in operation without the alien. Also considered in the "totality of circumstances" standard is the employer's level of compliance and good faith in processing the application and whether the business was created for the sole purpose of obtaining certification for the alien.

Here, there was no job opportunity open to U.S. workers as required by 20 C.F.R. § 656.20(c)(8) when the totality of circumstances are considered. As the person who currently holds the position of Executive Vice President, International Development, and who is a member of the Employer's board of directors and executive committee and the board of the Employer's parent company; the Alien is involved in management of the company and can influence hiring decisions. Moreover, the Alien also has a significant ownership interest. Further, the Alien possesses specialized or unusual qualifications set forth in the Special Requirements Section of the applications. Under these circumstances, there was no job open to U.S. workers; the only worker the Employer ever intended to consider for the position was the Alien. We agree with the CO that there was no bona fide job opportunity.

### **Rejection of Qualified U.S. Applicant**

Another one of the bases upon which the CO denied the application was the Employer's rejection of ostensibly qualified U.S. applicants.

Section 656.21(b)(6)<sup>1</sup> provides that if U.S. applicants have applied for the job opening, the employer must document that such applicants were rejected solely for job-related reasons; section 656.20(c)(8) provides that the application must show the job opportunity has been and is open to any qualified U.S. worker; and section 656.21(j)

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<sup>1</sup> All section references are to title 20 of the Code of Federal Regulations.

requires the employer to provide the local office with a written report of the results of the employer's post-application recruitment efforts. Under section 656.24(b)(2)(ii), the CO's determination whether to grant labor certification is made on the basis of whether there is a U.S. worker who is able, willing, qualified, and available for the job opportunity; such worker will be considered able and qualified if "by education, training, experience, or a combination thereof, [the worker] is able to perform in the normally accepted manner the duties involved in the occupation as customarily performed by other U.S. workers similarly employed."

In general, an applicant is considered qualified for the job if he or she meets the minimum requirements specified by an employer's application for labor certification. ***The Worcester Co, Inc.***, 93-INA-270 (Dec. 2, 1994); ***First Michigan Bank Corp.***, 92-INA-256 (July 28, 1994). It is well settled that an employer may reject an applicant who does not meet unchallenged job requirements. ***See Bronx Medical and Dental Clinic***, 90-INA-479 (Oct. 30, 1993) (*en banc*); ***AFS Intercultural Programs***, 92-INA-358 (May 11, 1994); ***O. Thompson Co.***, 91-INA-350 (May 26, 1993). Panels of the Board have also held that when an applicant fails to satisfy the minimum requirements, the burden shifts to the CO to prove that the applicant is qualified (in accordance with 20 C.F.R. § 656.24(b)(ii)). , ***See, e.g., Mindcraft Software, Inc.***, 90-INA-328 (Oct. 2, 1991); ***Houston Music Institute, Inc.***, 90-INA-450 (Feb. 21, 1991). ***See also Unisys***, 87-INA-555 (April 6, 1988). Moreover, the plurality *en banc* opinion in ***Bronx Medical*** and panel decisions such as ***AFS Intercultural Programs***, 92-INA-358 (May 11, 1994) found U.S. applicants who did not satisfy specified job requirements to be properly rejected, notwithstanding the CO's assertion that the applicants were capable of performing the job.

Where an applicant's resume shows a broad range of experience, education, and training that raises a reasonable possibility that the applicant is qualified, even if it does not state that he or she meets all the job requirements, an employer should further investigate the applicant's credentials by an interview or otherwise. ***See Dearborn Public Schools***, 91-INA-222 (Dec. 7, 1993) (*en banc*); ***Gorchev & Gorchev Graphic Design***, 89-INA-118 (Nov. 29, 1990) (*en banc*). Unsuccessful attempts at telephone contact, without more, are insufficient to establish a good faith effort to recruit. ***See, e.g., Gilliar Pharmacy***, 92-INA-3 (June 30, 1993). The employer is under an obligation to attempt alternative means of contact when initial means are unsuccessful. ***Yaron Development Co.***, 89-INA-178 (April 19, 1991) (*en banc*).

The *en banc* Board noted in ***Gorchev & Gorchev Graphic Design, supra***:

When an applicant's resume is silent on whether he or she meets a "major" requirement such as a college degree, an employer might reasonably assume that the applicant does not and, therefore, rejection without follow up may be proper. In the case of a subsidiary requirement with detailed specifications -- something a candidate might not indicate

explicitly on his resume though he possesses it -- an employer carries the obligation . . . to inquire further whether the applicant meets all the detailed specifications. [Citation omitted.]

The Board also held that the context of the resume may also affect the reasonableness of an employer's assumption that an applicant does not meet a requirement on which the resume is silent, and where a resume shows a comprehensive range of experience, education and training, an employer's failure to inquire further is more difficult to justify. In **Gorchev**, the Board found that in the case before it the employer should have inquired further as to the applicant's experience in photo art direction and special effects design.

In **Dearborn, supra**, there were two U.S. applicants for the position of Choral Director whose resumes did not show the required three years of experience in the job offered. The **en banc** Board, noting that one of the applicants had 10 years of experience as a director of school music programs and a total of over 25 years teaching music and directing choirs, held that the onus was on the employer to further investigate her background.

In the instant case, there were 110 applicants, but only one was interviewed, applicant Shrigley, who was found to be unqualified, a finding the CO does not dispute. Although all thirty of the applicants deemed to be qualified by the CO may not have met all the job requirements, at least some of them warranted further investigation. The Employer's approach of sending letters to the applicants asking them to further describe their qualifications was insufficient when the letters were not limited to requesting information concerning experience or education that was required for the job but was not specifically addressed in the resumes. Here, the inquiries were not so specifically confined and appeared to be designed to discourage applicants from pursuing the process further. In this regard, when contacted by the state agency, several applicants noted circumstances which seemed to be suspicious or unusual while others indicated that they did not understand why they were rejected without an interview. For example, applicant Divine was ostensibly qualified from his resume, but he was sent correspondence vaguely noting that he "probably" did not meet all of the stated executive level experience requirements (and it was unclear he met the Japanese language requirement) and requiring "additional responsive information within two weeks" for further consideration to be given to his applications. (AF 78-85). In another case, that of applicant Kita, the Employer acknowledged that he possibly met all specified criteria. However, a letter was sent to the applicant advising that he would be 60 years old in one year and Shaklee's parent company required mandatory retirement at age 60, although the applicant was told that he should write back if he still wished further consideration of his application, despite this "possible disqualification." (AF 164-165).

Under these circumstances, the Employer should have contacted applicants Divine, Kita, and others to determine whether they were, in fact, qualified, and we do not agree that the letters sent, which appeared to be designed to discourage the applicants, were an acceptable substitute. Thus, the Employer has not satisfied its burden of showing that there were no qualified U.S. applicants.

### **Foreign Language Requirement**

In view of the other two grounds for denying the application, it is unnecessary to consider whether the Employer has established business necessity for the Japanese language requirement under section 656.21(b)(2)(i)(c).

### **Conclusion**

In view of the above, the application for labor certification should be denied.

### **ORDER**

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

For the Panel:

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PAMELA LAKES WOOD  
Administrative Law Judge

**NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW:** This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

**Chief Docket Clerk  
Office of Administrative Law Judges  
Board of Alien Labor Certification Appeals  
800 K Street, N.W.  
Suite 400  
Washington, D.C. 20001-8002**

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.

BALCA VOTE SHEET

Case Name:        Shaklee Corporation  
                    (Alien: Masayasu Ueno)

Case No. :        94-INA-593

PLEASE INITIAL THE APPROPRIATE BOX.

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	:	CONCUR	:	DISSENT	:	COMMENT	:
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Vittone	:	:	:	:	:	:	:
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Thank you,

Judge Wood

Date: